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No. 93-1222

# In the Supreme Court of the United States

OCTOBER TERM, 1993

PRISCILLA M. GARCIA, ET AL., PETITIONERS

*v.*

SPUN STEAK COMPANY

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT*

**BRIEF FOR THE UNITED STATES AS AMICUS CURIAE**

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## QUESTION PRESENTED

Whether, as the Equal Employment Opportunity Commission has concluded, an English-only work rule has a discriminatory impact on the terms and conditions of employment of national origin minorities and therefore violates Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e-2(a), unless justified by business necessity.

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## BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

This brief is submitted in response to the Court's order inviting the Solicitor General to express the views of the United States.

### OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-19a) is reported at 998 F.2d 1480.

### JURISDICTION

The judgment of the court of appeals was entered on July 16, 1993. An order denying a petition for rehearing and suggestion for rehearing en banc was entered on October 29, 1993. The petition for a writ of certiorari was filed on January 24, 1994. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

## STATEMENT

1. Respondent Spun Steak is a poultry and meat producer. Pet. App. 2a. It employs thirty-three workers, twenty-four of whom are Hispanic. *Ibid.* Spun Steak's Hispanic employees speak with varying degrees of English proficiency. *Ibid.* Petitioners Garcia and Buitrago are two of Spun Steak's employees. *Ibid.* Both are bilingual.

For many years, the Hispanic employees of Spun Steak conversed freely in Spanish. *Id.* at 3a. In September, 1990, petitioners Garcia and Buitrago allegedly taunted a non-Hispanic employee in both English and Spanish. *Ibid.* The next day, company president Ken Bertelsen issued a letter stating (*ibid.*):

> only English will be spoken in connection with work. During lunch, breaks, and employees' own time, they are obviously free to speak Spanish if they wish.

Spun Steak later modified its policy to permit its clean-up crew, its foreman, and those authorized by its foreman to speak Spanish. Pet. App. 4a. The rule was strictly enforced, however, against petitioners Garcia and Buitrago. *Ibid.* Both were reprimanded for violating the English-only policy and, for a period of two months, they were not permitted to work next to each other. *Ibid.*

Petitioner Garcia contacted Local 115, which requested that Spun Steak rescind its rule. Spun Steak refused to do so, and petitioners Garcia, Buitrago, and Local 115 filed a charge of discrimination with the EEOC. Pet. App. 4a. The EEOC found reasonable cause to believe that respondent had violated Title VII. *Ibid.*

Thereafter, petitioners filed suit against respondent alleging that its English-only rule violated Title VII. *Ibid.* Petitioners Garcia and Buitrago filed suit on behalf of

themselves; Local 115 represents all Spanish-speaking employees at Spun-Steak. Pet. App. 5a.

2. The district court granted summary judgment in favor of petitioners. Pet. App. 35a. As a remedy, the court enjoined respondent from enforcing its English-only rule. *Id.* at 38a.

In comments from the bench, the court explained the basis for its ruling. The court found that respondent's English-only rule had a discriminatory impact on Hispanics. C.A. Rec. 227. The court reasoned that "You are telling [Hispanics] that they cannot make little jokes in their own language when you don't tell English speaking people that they can't do it in their own language. So it is clearly directed at Hispanics in this case." *Id.* at 226-227. The court further found that respondent had failed to demonstrate a sufficient business justification for the rule. *Id.* at 227. The court explained that respondent had other "adequate remedies" to deal with the kind of conduct that had prompted the rule. *Ibid.* The English-only rule, the court concluded, was like "hitting a flea with a sledge hammer. You have gone on far beyond the force that is needed for these circumstances." *Id.* at 224.

3. A panel of the Ninth Circuit reversed. It held that petitioners had failed to establish a prima facie case of discriminatory impact. The court first rejected petitioner's claim that the English-only policy had an adverse impact on Hispanics because it prevented them from expressing their cultural heritage and identity. The court concluded that while "an individual's primary language can be an important link to his ethnic culture and identity[,] Title VII * * * does not protect the ability of workers to express their cultural heritage at the workplace." Pet. App. 11a.

The court next rejected petitioner's claim that the English-only policy adversely affected Hispanic workers because it deprives them of the privilege of conversing in

the language they speak most comfortably. Pet. App. 11a. The court concluded that an employer has the right to define the "contours" of a privilege, and in this case, the employer has defined the privilege narrowly as "merely the ability to speak on the job." *Id.* at 11a-12a. When the privilege is defined in this way, the court concluded, bilingual employees are not adversely affected since they can engage in conversation on the job. *Id.* at 12a. The court also concluded that there was no disparate impact because "the bilingual employee can readily comply with the English-only rule and still enjoy the privilege of speaking on the job." *Ibid.* Even if bilingual employees unconsciously switch from one language to another, the court added, requiring them "to catch [themselves] from occasionally slipping into Spanish does not impose a burden significant enough to amount to the denial of equal opportunity." *Id.* at 12a-13a.

The court held that employees who speak no English might state a prima facie case. Pet. App. 13a. The court noted that there is one such employee at Spun Steak, and the court remanded for a consideration of her claim. *Ibid.* The court held that a prima facie case might also exist for employees "who have such limited proficiency in English that they are effectively denied the privilege of speaking on the job." *Ibid.* The court concluded that it was unclear from the record whether there are such employees and that a remand was necessary to resolve that issue. *Ibid.*

Finally, the court rejected petitioners' claim that respondent's English-only rule created an atmosphere of "inferiority, isolation, and intimidation." Pet. App. 14a. The court held that "[w]hether a working environment is infused with discrimination is a factual question, one for which a per se rule is particularly inappropriate." *Id.* at 15a. In this case, the court found, petitioners had introduced "no evidence other than conclusory statements

that the policy had contributed to an atmosphere of 'isolation, inferiority, or intimidation.' " *Ibid.* For that reason, the court concluded, "the bilingual employees ha[d] not raised a genuine issue of material fact that the effect is so pronounced as to amount to a hostile environment." *Ibid.*

The court acknowledged that its decision was at odds with the EEOC's longstanding position currently set forth in an EEOC Guideline (29 C.F.R. 1606.7) that an employer must provide a business justification for an English-only policy. *Id.* at 16a. The court concluded, however, that there were "compelling indications" that the EEOC had improperly interpreted Title VII. *Id.* at 16a-17a. In particular, the court concluded that the EEOC's Guideline is inconsistent with the policy of Title VII because it "presum[es] that an English-only policy has a disparate impact in the absence of proof." *Id.* at 17a.

Judge Boochever dissented in part. He would have deferred to the EEOC Guideline and held that "an employee establishes a prima facie case * * * by proving the existence of an English-only policy, thereby shifting the burden to the employer to show a business necessity." *Id.* at 18a. Judge Boochever would have remanded this case for a trial on the issue of business necessity. *Id.* at 19a. With Judge Boochever dissenting, the panel denied a petition for rehearing. *Id.* at 21a.

4. The full court rejected petitioners' suggestion for rehearing en banc. Pet. App. 21a. Judge Reinhardt dissented. He specifically took issue with the majority's view that English-only rules do not have a discriminatory effect because bilingual employees can easily comply with them. That conclusion, Judge Reinhardt stated, "demonstrated a remarkable insensitivity to the facts and history of discrimination." *Id.* at 24a. He explained that "[s]ome of the most objectionable discriminatory rules are the least obtrusive in terms of one's ability to comply: being required

to sit in the back of a bus, for example." *Ibid.* Judge Reinhardt further concluded that the suppression of a person's primary language cannot be dismissed as a "mere inconvenience." *Ibid.* Judge Reinhardt explained that "English-only rules not only symbolize a rejection of the excluded language and the culture it embodies, but also a denial of that side of an individual's personality." *Id.* at 24a-25a. Thus, "being forbidden under penalty of discharge to speak one's native tongue generally has a pernicious effect on national origin minorities." *Id.* at 25a.

## DISCUSSION

The court of appeals has rejected the EEOC's longstanding view that English-only work rules have a discriminatory impact on national origin minorities and therefore must be justified by business necessity. The court of appeals' decision is wrong. It fails to accord appropriate deference to the EEOC's longstanding view and is premised on several fundamental misunderstandings about what plaintiffs must prove in order to establish a discriminatory impact under Title VII. The decision also resolves an issue of great importance to national origin minorities and prevents the EEOC from administering a single nationwide standard for judging the validity of English-only work rules. Review by this Court is therefore warranted.

1. In 1970, the EEOC issued its first published decision on English-only rules. In that decision, the EEOC communicated its position (first taken in an unpublished decision in 1967) that such rules have "the obvious and clear effect of denying [national origin minority] employees * * * a term, condition, or privilege of employment enjoyed by other employees: to converse in a familiar language with which they are most comfortable." EEOC

Dec. 71446, 2 Fair Empl. Prac. Cas. (BNA) 1127, 1128 (1970). Accordingly, the EEOC explained, such rules must be justified by business necessity. *Ibid.* Later EEOC decisions adhered to that view. *E.g.*, EEOC Dec. 72-0281, 1973 CCH EEOC Dec. (CCH) ¶ 6293 (1971); EEOC Dec. 73-0479, 19 Fair Empl. Prac. Cas. (BNA) 1788, 1804 (1973).

In 1980, the EEOC adopted a Guideline that "reaffirm[ed] the Commission's position" on English-only work rules. Proposed Revision to Guidelines on Discrimination Because of National Origin, 45 Fed. Reg. 62,728 (1980). The Guideline states that "[a] rule requiring employees to speak only English at all times in the workplace is a burdensome term and condition of employment." 29 C.F.R. 1606.7(a) (1993). Because "[t]he primary language of an individual is often an essential national origin characteristic," the Guideline explains, "[p]rohibiting employees at all times, in the workplace, from speaking their primary language or the language they speak most comfortably, disadvantages an individual's employment opportunities on the basis of national origin." *Ibid.* In addition, the Guideline explains that such rules "may also create an atmosphere of inferiority, isolation and intimidation based on national origin which could result in a discriminatory working environment." *Ibid.* Based on those considerations, the Guideline provides that if an English-only rule is applied at all times, "the Commission will presume that such a rule violates title VII and will closely scrutinize it." *Ibid.* In a separate subsection, the Guideline further provides that "[a]n employer may have a rule requiring that employees speak only in English at certain times where the employer can show that the rule is justified by business necessity." 29 C.F.R. 1606.7(b). Both subsections of the Guideline are premised on the conclu-

sion that English-only rules have a discriminatory impact on national origin minorities and therefore must be justified by a business necessity.

Before issuing its Guideline, the EEOC sought comments from federal agencies and the public. 45 Fed. Reg. 51,229, 51,231 (1980); *id.* at 62,728. The EEOC received over 250 comments, and the final Guideline sought to accommodate some of the concerns expressed in those comments. *Id.* at 85,632, 85,634-85,635.

Following the promulgation of its English-only Guideline, the EEOC adopted a Compliance Manual Section to assist in the investigation of claims that English-only work rules violate Title VII. 2 EEOC Compliance Manual (BNA) 623 (Aug. 6, 1984). That Section thoroughly discusses possible business justifications for an English-only rule. For instance, the Manual suggests that an English-only rule would be appropriate in jobs in which the failure to maintain close communication among employees could result in injury to persons or property. Manual § 623.0012. The Manual lists as examples the performance of surgery or the drilling of an oil well. *Ibid.* On the other hand, the Manual suggests that the principal justification offered by respondent ordinarily would not justify an English-only rule. Manual § 623.0015. Thus, the Manual notes that while co-workers commonly express fears that employees speaking in a language other than English are making fun of them, those beliefs are often unfounded. *Ibid.* And even when an employee has a legitimate basis for complaint, the Manual explains, the problem can almost always be worked out informally. *Ibid.* If informal resolution fails, the Manual concludes, the employer can discipline the offending party. *Ibid.*

Since its adoption, the EEOC has consistently applied its Guideline in determining whether English-only work

rules violate Title VII. The EEOC has published several decisions that implement the Guideline. See, *e.g.*, EEOC Dec. 81-25, 27 Fair Empl. Prac. Cas. (BNA) 1820, 1822 (1981); EEOC Dec. 83-7, 31 Fair Empl. Prac. Cas. (BNA) 1861, 1862 (1983). It has also filed suit to enforce its interpretation. In the last eight years, the EEOC has filed suit to challenge English-only rules in nine cases. Eight of those cases have now been settled, with the employer in each agreeing to eliminate the English-only rule.[1]

When Congress amended Title VII in 1991 and altered the standards for proving disparate impact discrimination (see 42 U.S.C. 2000e-2(k)(1)(A)(i)), the EEOC's Guideline on English-only work rules was discussed on the floor of the Senate. Senator DeConcini stated that many of his constituents had complained about the use of English-only work rules and he asked Senator Kennedy, a sponsor of the legislation amending Title VII, whether the EEOC's Guideline would continue to apply to such rules. Senator Kennedy responded that the EEOC's Guideline had worked well during the prior eleven years and that nothing in the new legislation would affect the validity of that Guideline. 137 Cong. Rec. 15,489 (daily ed. Oct. 30, 1991).

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[1] See *EEOC* v. *Lewis & Son d/b/a/ Comet and Qwik Cleaners*, No. CIV-92-1072 JP/LFG (D.N.M. filed Sept. 28, 1992); *EEOC* v. *The Brown Derby Restaurant*, No. 90-5004-RJK (C.D. Cal. filed Sept. 19, 1990); *EEOC* v. *Mansfield Business Sch.*, No. EP90-CA-390H (W.D. Tex. filed Sept. 27, 1990); *EEOC* v. *Sears, Roebuck & Co.*, No. 90-3037-WPG (C.D. Cal. filed June 13, 1990); *Dimaranan & EEOC* v. *Pomona Valley Medical Ctr.*, No. 89-4299 ER (C.D. Cal. filed Apr. 2, 1990); *EEOC* v. *Volunteers of Am. Care Facilities*, No. 89-1586 (D. Ariz. filed Sept. 27, 1989); *EEOC* v. *Salvation Army*, No. 87-07846 (C.D. Cal. filed Nov. 20, 1987); *EEOC* v. *Motel 6—Yuma*, No. CIV86-1170-PHX-EHC (D. Ariz. filed July 17, 1986). In *EEOC* v. *Wynell, Inc., d/b/a A & B Nursery Sch.*, No. H-92-3938 (S.D. Tex. filed Dec. 21, 1992), the district court recently upheld the employer's English-only rule.

2. In *EEOC* v. *Arabian Am. Oil Co.*, 499 U.S. 244, 257 (1991), this Court held that the level of deference afforded an EEOC interpretation of Title VII "will depend on the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control." *Id.* at 257. This Court has also indicated that an agency interpretation is entitled to greater deference when Congress is aware of the interpretation and does not change it, but amends the statute in other respects. *United States* v. *Rutherford*, 442 U.S. 544, 554 (1979).

Measured against those criteria, the EEOC's position on English-only rules is entitled to substantial deference. The EEOC adopted its position three years after Title VII was enacted and has followed it ever since. The EEOC's position has been subjected to full notice and comment review and thoroughly tested by experience. The EEOC's English-only Guideline and the Compliance Manual Section implementing it set forth a reasoned and careful analysis of the issue. And when Congress adopted recent amendments to Title VII on disparate impact discrimination, it left EEOC's approach intact.

Most important, the EEOC's interpretation reflects a sound application of established Title VII principles. Title VII flatly prohibits all discrimination in the "terms, conditions, or privileges of employment" because of national origin. 42 U.S.C. 2000e-2(a)(1). Discrimination within the meaning of Title VII includes practices that disproportionately impose adverse impact on members of a protected group and that cannot be justified by business necessity. *Griggs* v. *Duke Power Co.*, 401 U.S. 424, 431 (1971). The EEOC's position on English-only rules follows directly from these principles. English-only rules plainly impose a

term or condition of employment. And while English-only rules may perhaps be seen as facially neutral, they disproportionately burden national origin minorities because they preclude many members of national origin minority groups from speaking the language in which they are best able to communicate, while rarely, if ever, having that effect on non-minority employees. Accordingly, under established Title VII jurisprudence, such rules must be justified by business necessity.

3. The Ninth Circuit held that the EEOC's interpretation is not entitled to deference. In the Ninth Circuit's view, the EEOC's Guideline is inconsistent with the policy of Title VII because it "presum[es] that an English-only policy has a disparate impact in the absence of proof." Pet. App. 17a. That criticism is incorrect. The EEOC has soundly concluded, based on logic and experience, that English-only rules invariably have a disparate impact on national origin minority groups. It is certainly true that many members of national origin minority groups feel completely comfortable speaking English in all circumstances; it is also true that some employees who do not belong to such a group may sometimes be more comfortable speaking a language other than English. But there can be no doubt that, in a workplace with a substantial number of national origin minority group employees, English-only work rules will necessarily preclude disproportionately more national origin minority employees than others from conversing in the language in which they are most comfortable and best able to communicate. The EEOC therefore properly adopted a categorical approach to the issue of the disparate impact of English-only rules, rather than requiring proof of the obvious on a case-by-case basis.

The court of appeals appeared to understand that English-only rules invariably preclude disproportionately

more national origin minority employees than others from conversing in their primary language. Pet. App. 10a. It held nevertheless that this effect was insufficient to support a Title VII disparate impact claim. Pet. App. 11a-13a. That conclusion is based on several serious misconceptions about what plaintiffs must prove to establish a disparate impact under Title VII.

First, the court held that since a privilege of employment "is by definition given at the employer's discretion," respondent was free to define the privilege "narrowly" as "merely the ability to speak on the job." Pet. App. 11a-12a. Because bilingual Hispanic employees enjoy that narrow privilege to the same extent as non-Hispanic employees, the court reasoned, bilingual employees could not state a disparate impact claim. *Id.* at 12a. As this Court has held, however, "[a] benefit that is part and parcel of the employment relationship may not be doled out in a discriminatory fashion, even if the employer would be free * * * not to provide the benefit at all." *Hishon* v. *King & Spaulding*, 467 U.S. 69, 75 (1984). Title VII, as we have noted, is not concerned solely with rules that have been defined in discriminatory terms. It also prohibits rules that are "discriminatory in operation." *Griggs*, 401 U.S. at 431. No matter how narrowly respondent has defined the privilege to speak on the job, the consequence of respondent's English-only rule is that its non-Hispanic employees are able to converse in the language in which they are best able to communicate, while many of its Hispanic employees are not. That discriminatory consequence violates Title VII unless it is justified by a business necessity.

Second, the court of appeals held that respondent's English-only rule did not have a disparate impact on bilingual Hispanic employees because they can comply with the rule. Pet. App. 12a. However, as Judge Reinhardt ex-

plained, history reveals that "[s]ome of the most objectionable discriminatory rules are the least obtrusive in terms of one's ability to comply: being required to sit in the back of a bus, for example." *Id.* at 24a. Under the court of appeals' analysis, a black employee could not challenge a rule requiring black employees to use separate bathrooms and drinking fountains; an Orthodox Jew could not challenge a rule forbidding the wearing of head coverings; and bilingual members of a national origin minority group could not challenge a rule requiring employees to speak only English at all times on the employer's premises, including at lunch and at breaks (even though respondent in this case thought it obvious that employees should be able to speak their language of choice on their own time). Those examples illustrate that the court of appeals seriously erred in focusing on the physical difficulty of complying with respondent's English-only rule, rather than on the discriminatory impact of that rule upon Hispanic employees.

Finally, the court of appeals held that plaintiffs in a Title VII case must demonstrate that they have suffered a "significant" adverse impact. Pet. App. 12a. In the court's judgment, moreover, English-only rules do not impose a significant adverse impact on bilingual employees. *Id.* at 12a-13a. This Court, however, has rejected the view that the Equal Protection Clause requires a plaintiff who is subjected to discriminatory treatment to prove some minimum level of adverse effects. *Papasan* v. *Allain,* 478 U.S. 265, 288 n.17 (1986). Indeed, even when a difference in treatment causes nothing more than "inconvenience," that difference must be justified. *Mississippi University for Women* v. *Hogan,* 458 U.S. 718, 723 n.8 (1982). The same is true of Title VII.[2]

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[2] To establish the element of causation under Title VII, a plaintiff must show that a rule has adversely affected significantly more

In any event, English-only rules have a significant adverse impact on bilingual members of national origin minorities for at least two reasons. First, such rules significantly handicap the ability of bilingual employees to communicate on the job. Bilingual persons have a wide range of English-speaking ability, from minimally proficient to fully fluent. For those who have minimal or less than average English-speaking ability, an English-only rule can dramatically limit their range of expression and communication. And even bilingual persons who speak English very well can ordinarily speak their primary language with more "precision and power." *Hernandez* v. *New York*, 111 S. Ct. 1859, 1868 (1991). Depriving persons of the opportunity to use the language in which they communicate most effectively cannot be characterized as a de minimis injury.

English-only rules also do more than limit an employee's range of expression. "Language permits an individual to express both a personal identity and membership in a community." *Hernandez*, 111 S. Ct. at 1872. It is "used to define the self." *Id.* at 1868. Accordingly, as Judge Reinhardt stated, to banish a person's primary language from the workplace not only communicates "a rejection of the excluded language and the culture it embodies, but also a denial of that side of an individual's personality." Pet. App. 24a-25a. That serious imposition requires a business justification under Title VII.

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members of one group than another. *Watson* v. *Fort Worth Bank & Trust*, 487 U.S. 977, 994-995 (1988) (plurality opinion). There is no requirement, however, that plaintiffs prove that the discriminatory harm they have suffered because of national origin satisfies some threshold standard of "significance."

4. The question whether English-only rules must be justified by business necessity is an important and recurring one. There are indications that there has been a recent upsurge of such rules in the workplace. The EEOC currently has approximately 120 active charges against 67 different employers who have imposed English-only rules.

The Ninth Circuit's decision is also especially troubling because of the composition of the population in that Circuit. About one-third of the people in the United States who speak a language other than English at home live in the states included in the Ninth Circuit.[3] That large group is now precluded from relying on the EEOC's Guideline in seeking protection from English-only rules.

The decision in this case also interferes with the EEOC's ability to administer a uniform nationwide policy on English-only workplace rules. If the Ninth Circuit's decision is left unreviewed, the EEOC must either renounce its longstanding policy on English-only work rules, or it must develop one enforcement policy for cases in the Ninth Circuit and another for cases in the remaining circuits. The EEOC should not be forced to make that choice.[4]

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[3] The nine states that make up the Ninth Circuit contain over ten million people who speak a language other than English at home. 1990 Census of Population, Social and Economic Characteristics, Nos. 1990 CP-2-3 (Alaska); 1990 CP-2-4 (Ariz.); 1990 CP-2-6 (Cal.); 1990 CP-2-13 (Haw.); 1990 CP-2-14 (Idaho); 1990 CP-2-28 (Mont.); 1990 CP-2-30 (Nev.); 1990 CP-2-39 (Or.); 1990 CP-2-49 (Wash.), Table 18. Close to 32 million people in the United States speak a language other than English at home. 1990 Census of Population, Social and Economic Characteristics, No. 1990 CP-2-1 (United States), Table 15.

[4] Only one other Circuit has addressed the validity of English-only work rules, and that decision preceded the adoption of EEOC's Guideline. See *Garcia* v. *Gloor*, 618 F.2d 264 (5th Cir. 1980), cert. denied, 449 U.S. 1113 (1981). The scope of that decision is not entirely clear. See 45 Fed. Reg. 62,728 (1980) (viewing it as limited to bilingual employees who fail to show that their primary language is one other

## CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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than English). The Fifth Circuit expressly noted the absence of an EEOC Guideline as a factor in its decision. 618 F.2d at 268 n.1.

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